IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 2001

Supreme Court, U.S.
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No.01- 495

JANIE COCKRELL,
Director, Texas Department of Criminal Justice,
Institutional Division,
Petitioner,

versus,

CALVIN JEROLD BURDINE,
Respondent.

On Petition for Writ of Certiorari
To the United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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CAPITAL §2254 HABEAS CORPUS CASE

QUESTION PRESENTED

Is certiorari warranted to review the unremarkable, fact-based, case-specific holding of the lower court that "the repeated unconsciousness of [respondent's] counsel through not insubstantial portions of the critical guilt-innocence phase of [respondent's] capital murder trial" violates the Sixth Amendment and "warrants a presumption of prejudice," especially when the court also held that the case was "limited to the egregious facts found by the state habeas court in this case." Burdine v. Johnson, 262 F.3d 336, 349 (5th Cir. 2001) (*en banc*)?

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For the reasons set forth herein, Calvin Jerold Burdine respectfully opposes petitioner's request for certiorari review by this Court.

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The opinion of the United States Court of Appeals for the Fifth Circuit is published at Burdine v. Johnson, 262 F.3d 336 (5th Cir. 2001) (*en banc*); Appendix

to Petition for Writ of Certiorari [hereinafter "App."] at 1a-133a.

JURISDICTION

This Court has jurisdiction pursuant to 28 U.SC. §1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Sixth Amendment of the United State Constitution, which provides in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense.

U.S. CONST. amend. VI.

STATEMENT OF THE CASE

A. Course of Proceedings

A Houston, Texas jury convicted Mr. Burdine of capital murder and sentenced him to death on January 30, 1984. Tr. 62-64.[1] Mr. Burdine was the only defendant at trial, and he was represented bya single court-appointed attorney Houston sole practitioner Joe Frank Cannon. The trial court also appointed Mr.

[1] The lower court record is cited herein as follows: "Tr." refers to the state trial transcript of pleadings; "SR" refers to the trial court reporter's record of the trial proceedings; "SHR" refers to the court reporter's transcription of the 1995 state habeas evidentiary hearing; "FHR" refers to federal district clerk's collection of pleadings, court orders, etc., filed during the federal habeas corpus proceedings.

Cannon to represent Mr. Burdine on appeal,[2] and the conviction and sentence of death were affirmed by the Texas Court of Criminal Appeals. See Burdine v. State, 719 S.W.2d 309 (Tex.Crim.App. 1986), cert. denied 480 U.S. 940 (1987). From 1987 through 1995, Mr. Burdine pursued post-conviction relief in the state courts. Ex Parte Burdine, No. 379444-A (183rd Dist. Ct. Harris County Tex. June 29, 1994); Ex Parte Burdine, Writ No. 16,725-02 (Tex.CrimApp. Dec. 12, 1994); Ex Parte Burdine, No. 379444-B (183rd Dist. Ct. Harris County Tex. April 4, 1995), App. 161c-185c; Ex Parte Burdine, Writ No. 16,725-06 (Tex.CrimApp. April 6, 1995). Mr. Burdine then filed a federal petition for writ of habeas corpus raising numerous claims for relief. The district court granted relief on Mr. Burdine's claim that his trial counsel deprived himof his Sixth Amendment right to counsel by sleeping during the trial. Burdine v. Johnson, 66 FSupp. 2d 854 (S.D. Tex. 1999); App.134b-160b. The state appealed, and a divided panel of the Fifth Circuit reversed. Burdine v. Johnson, 231 F.3d 950 (5th Cir. 2000). The *en banc* court vacated the panel opinion, 234 F.3d 1339 (5th Cir. 2000), and ultimately affirmed

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[2] Petitioner misleads the Court in asserting that Mr. Burdine "requested" that Mr. Cannon represent him on appeal. *See Cert.* Petition [hereinafter "Pet."] at 4. In fact, at the end of trial the judge declared *sua sponte* that he was appointing Mr. Cannon on the appeal. Mr. Cannon thereafter told Mr. Burdine, on the record, that the choice was not up to Mr. Burdine, but nevertheless asked him to express his desires about appointed counsel on appeal. In this context, Mr. Burdine "accepted" Mr. Cannon as appellate counsel, and the trial judge then reiterated that Mr. Cannon was appointed. 17 SR 713-14.

the district court's grant of habeas corpus relief. Burdine v. Johnson, 262 F3d 336 (5th Cir. 2001) (*en banc*); App. 1a-133a.

B. Statement of Facts

(1) Facts Regarding the Offense and Trial Evidence

The trial in this case was unusually brief for a capital murder proceeding. While the presentation of evidence, arguments of counsel, and jury instruction spanned six days, the actual time before the jury amounted to less than thirteen hours. 262 F.3d at 338; App. 2a. This apparent discrepancy is accounted for by late starts, early recesses, and some days when the trial proceedings lasted for only a brief period. See 3 SHR Defense Exhibit 2 (trial court docket).

The evidence implicating Mr. Burdine in the death of W.T. Wise was in dispute. Mr. Burdine testified that he was present during the crime but that only co-defendant Douglas McCreight participated in the murder. 14 SR 390-403. Mr. Burdine acknowledged involvement in the plan to take some of Mr. Wise's property (because he had been robbed of money by Wise), but he attempted to dissuade McCreight from killing Mr. Wise. 14 SR 456-80.

According to police detectives who testified at trial, however, Mr. Burdine allegedly gave a prior, inconsistent oral confession in which he admitted that he and McCreight each stabbed Mr. Wise once using the same knife. 13 SR 251. The prosecutor at trial advocated this version of events. 15 SR 551. Notably here, the prosecutor adopted the position that Mr. McCreight was equally involved in the

murder of Mr. Wise; nevertheless, McCreight was allowed to plead guilty to murder and received a sentence of 45 years in prison. He was released on parole after less than eight years in prison. Burdine v. Johnson, 66 F.Supp.2d 854, 855 n.1 (S.D.Tex. 1999); App. 135b.

(2) Facts Regarding Attorney Sleeping

It is undisputed that Mr. Burdine's trial attorney, Joe Cannon, slept repeatedly and for prolonged periods of time throughout both phases of Mr. Burdine's capital murder trial. At a state habeas corpus hearing Mr. Burdine presented substantial evidence that Mr. Cannon slept often during trial, and the state habeas court so found. App. 161c-185c.

Among the most compelling sleeping evidence was the testimony of Rose Marie Berry, the head clerk of the court during the Burdine trial, who sat facing Mr. Cannon 10-12 feet away from him throughout the proceedings. 2 SHR 108-110-12; 121, 3 SHR Defense Exhibit #1A. Ms. Berry witnessed Mr. Cannon sleeping repeatedly, throughout both phases of trial, and for periods of time lasting up to at least ten minutes. 2 SHR 113-22. "I do know that he fell asleep and was asleep for long periods of time during the questioning of witnesses." *Id.* at 126. She was also certain that Mr. Cannon was actually sleeping, and not merely nodding off or concentrating with his eyes closed: "I saw his head going backwards and forwards

the way people do when they fall asleep." He would suddenly dart his head upward in a startled manner when he was awakened. *Id.* at 122. "I know when a person has his eyes closed and [is] concentrating or [conversely] when a person has his eyes closed and is asleep. *Mr. Cannon was asleep.*" *Id.* at 123 (emphasis added).[3]

Jurors from the Burdine trial, including the foreman, confirmed Ms. Berry's account in sworn testimony. Acknowledging that most of their attention was focused on the prosecutor and the witnesses, these jurors nevertheless observed Mr. Cannon sleeping "a bunch," "quite a bit," at times "a good [–] probably at least 10 minutes," during both phases and on different days of trial, and while the prosecutor

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[3] In fact Ms. Berry had witnessed Joe Cannon asleep in her court on other occasions: as a long time clerk, she testified: "I knew Joe Cannon. I had seen him before. I knew that he had this problem." 2 SHR at 114, 119. Ms. Berry also testified that prosecutor Ned Morris was aware of the problem, and even made comments during the Burdine trial about Mr. Cannon's sleeping. *Id.* at 116-17. A Houston attorney testified that he had witnessed Mr. Cannon sleeping for prolonged periods of time in another capital murder trial in which he had served as second chair defense counsel. *Id.* at 159-65. Consistent with the testimony of other witnesses, this attorney testified that Mr. Cannon fell asleep for periods of up to "15 minutes or better" *id.* at 165, and that "it happened often." *Id.*

was questioning witnesses and presenting evidence against Mr. Burdine. 2 SHR at 25-27, 30, 31, 39, 40, 45, 46-49, 53-54, 60-62, 64-65. As with Ms. Berry even under sharp cross-examination these jurors were unequivocal in their testimony that Mr. Cannon was in fact sleeping, and not merely "concentrating" with his eyes shut. They too described a number of the same obvious signs noted by Ms. Berry, including his head being down and bobbing, and the "startled type manner" in which Mr. Cannon would "bring his head back up" after a period of sleeping. 2 SHR at 53-54, 56.

One juror even described when the clerk "dropped a book and made a sharp noise" and Mr. Cannon "kind of like jarred up and turned his head.... His eyes were red like he was pulling out of sleep. And he actually wiped them and looked around startled.... I couldn't believe it, you know." *Id.* at 61-62. Like Ms. Berry, this juror observed Mr. Cannon sleeping for "a good [–] probably at least 10 minutes." *Id.* Another juror noted that if Mr. Cannon had been sleeping just prior to being addressed by the Court or opposing counsel, he would "hesitate a little" before getting up to speak or responding to an inquiry *Id.* at 47-48.

The state habeas court's findings as to Mr. Cannon's sleeping are extensive and detailed. *See* App. C. The court found that the sleeping occurred in particular during the guilt-innocence phase when the State's solo prosecutor was questioning

witnesses and presenting evidence." App. 175c. The court also found that Mr. Cannon slept for periods of "at least 10 minutes" (App. 176c) and that on many occasions Mr. Cannon was either "in the process of dozing off or was actually sleeping." *Id.* The court noted that clerk Rose Marie Berry, who had provided the most detailed accounting of the extent and nature of Mr. Cannon's sleeping, was "the most compelling witness," citing several reasons:

> ☼ Ms. Berry was "credible and ha[d] no motive to misrepresent the truth";
> ☼ she "had the best opportunity of any participant at trial to observe defense counsel during trial" owing to being "approximately 10-12 feet away from defense counsel";
> ☼ unlike the other witnesses or participants Ms. Berry "was not required to pay any attention to witnesses who were testifying" and indeed, from her vantage point "could not even see the witnesses"; and,
> ☼ she had "watched defense counsel continuously during the periods she observed him sleeping."

App. 176c-177c.

ARGUMENT

In this case, the Court of Appeals for the Fifth Circuit applied the rule of Powell v. Alabama, 287 U.S. 45 (1932), and United States v. Cronic, 466 U.S. 648 (1984), to grant habeas corpus relief where a state post-conviction judge and the federal district court had both found as a fact that Calvin Jerold Burdine's defense attorney repeatedly "'dozed and actually fell asleep during portions of [Burdine's] trial on the merits, in particular the guilt-innocence phase when the State's solo

prosecutor, was questioning witnesses and presenting evidence." Burdine v. Johnson, 262 F.3d 336, 340 (5th Cir. 2001) (*en banc*); App. at 5a. The Fifth Circuit's decision is entirely fact-based and case-specific:

> As in [United States v.] Russell, [205 F.3d 768 (5th Cir. 2000)], we decline to adopt a per se rule that any dozing by defense counsel during trial merits a presumption of prejudice. Our holding, that the repeated unconsciousness of Burdine's counsel through not insubstantial portions of the critical guilt-innocence phase of Burdine's capital murder trial warrants a presumption of prejudice, is limited to the egregious facts found by the state habeas court in this case.

262 F.3d at 349; App. 20a.

There is nothing in such a decision to warrant review on *certiorari*. The only non-case-specific proposition which the Fifth Circuit had to or did adopt in reaching its result was that a completely "unconscious attorney is in fact no different from an attorney that is physically absent from trial since both are equally unable to exercise judgment on behalf of their clients." *Id.* That truism would be altogether trite and unremarkable except for the fact that the occasions for bespeaking it are singularly rare.

It is this rarity which petitioner's [hereinafter "Texas"] *cert.* petition attempts to exploit by suggesting that the decision below seems in some way to be *anomalous*. But the sole anomaly resides in the sheer improbability that such a bizarre set of facts as those giving rise to the issue decided by the Fifth Circuit

should ever have occurred in the first place. And of course that anomaly is an independently sufficient reason to deny *certiorari*, not a reason to grant it.[4]

Texas tries to meet this difficulty by manufacturing a case for *cert.* on a theory of inter-circuit conflict. Each and everyone of the conflicts it puts forward is spurious – concocted by misreading the decision below, by misrepresenting the holdings of the cases that are said to conflict with the decision below, by treating fact-specific rulings as pronouncements of general legal rules, and/or conversely by

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[4] The dissenting opinion of Judge Barksdale below translates the same anomaly into an argument under Teague v. Lane, 489 U.S. 288 (1989). The argument seems to be that whenever an old rule is applied to a novel set of facts, that application creates a new rule – even when the novelty of the facts consists of being so extreme as to make the old rule applicable "*a fortiori*" (Stringer v. Black, 503 U.S. 222, 229 (1992)) – as here, where counsel's total unconsciousness ***dwarfs*** the statement in Cronic explaining Powell v. Alabama as "a case in which the surrounding circumstances made it so unlikely that any lawyer could provide effective assistance that ineffectiveness was properly presumed without inquiry into actual performance at trial" (466 U.S. at 661). Texas's *cert.* petition includes a reference to Teague in the questions presented but does not discuss the supposed Teague issue anywhere in the body of the petition, probably because it would not survive explicit analysis even by a proponent.

treating trivial semantic differences in adjectives or adverbial clauses used by different courts to say the same thing as vast, portentous rifts. This is all no more than casuistry.

We explore Texas's three purported "conflicts" in turn:

Purported Conflict I

Texas's first assertion of inter-circuit conflict (in Point I at pages 9-13 of the *cert.* petition) has to do specifically with cases about lawyers sleeping for extended periods during their client's criminal trial. This Point identifies four "issues" that are said to be the subject of varying "tests," and it declares that "twenty-five years of jurisprudential evolution has resolved those issues in conflicting way." (Pet. at 11-12.). The total number of cases to which Texas refers as "twenty-five years of jurisprudential evolution" is three (**3**), including the Burdine decision below. And the three cases are entirely consistent.

The two besides Burdine are Javor v. United States, 724 F.2d 831 (9th Cir. 1984), and Tippins v. Walker, 77 F.3d 682 (2nd Cir. 1996). Both cases granted post-conviction relief to convicted defendants who showed that their attorney had slept during substantial periods of evidence-taking at their trials. Both did so under the Powell-Cronic rule without requiring a showing of prejudice. Both made clear

that they did so because, factually, the extent of the attorney's sleeping brought the cases within the same reasons for the rule that were cited and identified bythe Burdine court below.[5] Both emphasized, as did the Burdinecourt, that their

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[5] Javor: "[U]nconscious or sleeping counsel is equivalent to no counsel at all. . . . The prejudice inherent in Javor's counsel's actions is well illustrated by considering the ongoing consultation ordinarily required in the course of a criminal trial. Generally an attorney and client need to confer about the testimony or evidence adduced at trial and together evaluate its impact. . . . Moreover, a trial attorney must be present and attentive in order to adequately test the credibility of witnesses on cross-examination . . . ." (724 F.2d at 834.) This is not a case in which counsel's failing consists of "specific errors" whose "impact . . . 'appears on the face of the trial record' and thus is narrowly and readily reviewable. . . . ¶ When a defendant's attorney is asleep during a substantial portion of his trial, the defendant has not received the legal assistance necessary to defend his interests at trial. . . . [A]n inquiry into the question of prejudice would require 'unguided speculation' . . . because an attorney's absence prejudices a defendant more by what was not done than by what was done." (724 F.2d at 834-835.)

Tippins: "[A]s the majority reasoned in Javor, '[p]rejudice is inherent' at some point, 'because unconscious or sleeping counsel is equivalent to no counsel at all.' . . . Effectiveness of counsel depends in part on the ability to confer with the client during trial on a continuous basis, and the attorney must be 'present and attentive' in order to make adequate cross-examination. . . . Moreover, if counsel sleeps, the ordinary analytical tools for identifying prejudice are unavailable. The errors and lost opportunities may not be visible in the record, and the reviewing court applying the traditional Strickland analysis may be forced to engage in 'unguided speculation.'" (77 F.3d at 686.)

Burdine: "[O]nce we have accepted as presumptively correct the state court's finding that counsel slept 'during portions of [Burdine's] trial on the merits, in particular during the guilt-innocence phase when the State's solo prosecutor was questioning witnesses and presenting evidence,' there is no need to attempt to further scrutinize the record. *See* Javor v. United States, 724 F.2d 831, 834 (9th Cir.1984) (holding that '[w]hen a defendant's attorney is asleep during a substantial portion of his trial, the defendant has not received the legal assistance necessary to defend his interests at trial' and thus, prejudice must be presumed)." (262 F.3d at 348-349; App.18a - 19a.). "Unconscious counsel equates to no counsel at all. Unconscious counsel does not analyze, object, listen

holdings had to do with *sleeping*; that sleeping meant sleeping, not mere drowsiness or nodding;[6] and that even *sleeping* would not justify the Powell-Cronic presumption of prejudice if it was not of substantial duration or if it occurred at times when counsel's attention to the proceedings was not essential for the protection of his or her client's interests at the trial. It is the slightly different language used by the three courts to say these same things – and to describe the differing facts of the three cases in which these same things were said – that Texas

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or in any way exercise judgment on behalf of a client. As recognized by the Second Circuit, 'the buried assumption in our Strickland cases is that counsel is present and conscious to exercise judgment, calculation and instinct, for better or worse. But that is an assumption we cannot make when counsel is unconscious at critical times.' Tippins . . . . When we have no basis for assuming that counsel exercised judgment on behalf of his client during critical stages of trial, we have insufficient basis for trusting the fairness of that trial and consequently must presume prejudice." (262 F.3d at 349; App.19a.)

[6] Javor: "The magistrate . . . found as a matter of fact that Javor's attorney was sleeping while testimony pertaining to [Javor] . . . was being adduced and from time to time had indicated to another defendant's lawyer that 'he had missed some of the testimony and asked ... if he had missed anything related to [Javor].'" (724 F.2d at-835.)

Tippins: "Based on the hearing record, the district court concluded that Tippins was denied effective assistance of counsel. That conclusion is sustainable if – as seems clear – [Tippins's lawyer] . . . was repeatedly unconscious, and if that happened at times when Tippins's interests were at stake. ¶ A consensus of those who could observe [the lawyer] . . . confirms that episodes of deep sleep were repeated, and lasted for (at least) several minutes at a time. The testimony also confirms that Tippins interests were at stake while his counsel slept." (77 F.3d at 689.)

Burdine: "The factual findings made during Burdine's state habeas proceedings demonstrate that Burdine's counsel was repeatedly asleep, and hence unconscious, as witnesses adverse to Burdine were examined and other evidence against Burdine was

seizes on to cry conflict.

The four theaters of conflict, Texas says, are that the three cases decided on this topic "require different threshold depths of sleeping[,]. . . require different lengths of sleeping[,]. . . demand that sleeping be localized during trial phases of varying descriptions[, and]. . . apply different definitions of prejudice." (Pet. at 12.) The short answer to this misrepresentation is that the snatches of prose which Texas quotes from the opinions to describe their supposed holdings, "tests" and "require[ments]" are invariably lifted from the opinions' *statements of the facts of the case at bar* – or from the statement of facts in one opinion and the statement of the ruling in another – and do not, in *any* of the four supposed theaters of conflict, accurately describe what *any* of the opinions "require."

A more detailed answer is this:

(1) Javor, Tippins and Burdine do **not** establish different "tests" for "threshold depths of sleeping –ranging from total unconsciousness, App. 7a; Tippins, 77 F.3d, at 688, to 'dozing,' Javor, 724 F.2d at 832." (Pet. at 12.). The purported dissonance here is created solelyby Texas's quotation of the word "dozing" from page 688 of the Javor opinion, where it appears in the Javor Court's

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introduced." (262 F.3d at 349; App. 19a.)

quotation from the factual findings of a federal magistrate that Javor's trial counsel was "asleep or dozing." Texas not only fails to tell this Court the context of the word – or even to set it in the double-quotation marks required by accuracy and candor – but omits to tell the Court that (a) the Javor magistrate's finding, after saying that counsel was "asleep or dozing" goes on to say that "*by reason thereof* petitioner was not assisted bycounsel . . . [on] occasions when evidence relevant to the prosecution case . . . was being elicited and the participation of trial counsel (to observe witnesses, listen to testimony, consider the posing of objections, prepare cross-examination of witnesses, consider the preparation of rebuttal evidence, and prepare argument on such evidence) was proper"(724 F.2d at 832 (emphasis added)) – so that it is plain that the magistrate found that Javor's counsel *was* unconscious; and (b) that the Ninth Circuit's stated reason for its application of the Powell-Cronic presumption-of-prejudice rule to the magistrate's findings in Javor plainly posits the lawyer's unconsciousness: "Prejudice is inherent in this case because unconscious or sleeping counsel is equivalent to no counsel at all."(724 F.2d at 834.).

(2) Javor, Tippins and Burdine do **not** "require different lengths of sleeping – through 'substantial' trial portions, Javor, 724 F.2d, at 833, for 'repeated and prolonged lapses,"Tippins, 77 F.3d, at 687, or . . . through 'not insubstantial'

trial portions, App. 7a." (Pet. at 12.) Texas cannot seriouslybe contending that this Court's *certiorari* jurisdiction should be exercised to settle once and for all the conflict between "substantial" in Javor and "not insubstantial" in Burdine[7]; so its conflict claim here must have to do with a supposed dissonance between those formulations and Tippins's. But the language that Texas quotes fromTippins is the subtitle of a section of the Tippins opinion devoted to reviewing the findings of fact made by the district court (see 77 F.3d at 687); the Tippins court's holding is set out in the immediately preceding section and is: "We therefore conclude that Tippins suffered prejudice, by presumption or otherwise, if his counsel was repeatedly unconscious at trial for periods of time in which defendant's interests were at stake." (77 F.3d at 687). There is manifestly no "length-of-sleeping" conflict between this holding and the holding below "a defendant's Sixth Amendment right to counsel is violated when that defendant's counsel is *repeatedly unconscious*

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[7] Burdine would, in any event be the wrong pinhead on which to set these angels dancing, because the "not insubstantial" phrase in Burdine was used to characterize a holding "limited to the egregious facts found by the state habeas court in this case" (262 F.3d at 349; App. 20a), and those facts, as quoted by the Fifth Circuit *en banc*, included the facts that "'defense counsel repeatedly dozed and/or actually slept during *substantial* portions of [Burdine's] capital murder trial" (262 F.3d at 340; App. 5a).

through not insubstantial portions of the defendant's capital murder trial" (262 F.3d at 341; App. 7a).

(3) Javor, Tippins and Burdine do **not** "demand that sleeping be localized during trial phases of varying descriptions – periods when 'testimony pertaining to' a defendant is adduced, Javor, 724 F.2d, at 834, when the defendant's 'interests are at stake,' Tippins, 77 F.3d, at 689, or when 'evidence is being produced against' a defendant, App. 18a." (Pet. at 12.) Again, it cannot be supposed that Texas is asking this Court to grant *certiorari* to decide whether the Circuit Courts are permitted to describe the direct examination of prosecution witnesses as "testimony" or as "evidence,"[8] or whether they should write that it is being "adduced" rather than "produced"; so Texas's third purported conflict must, once more, have to do with Tippins. Both Javorand Burdine use the phrases quoted by Texas – "when 'testimony pertaining to' a defendant is adduced," and "when 'evidence is being produced against' a defendant" in the course of describing the facts found by the lower courts in the respective cases.[9] Therefore, any

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[8] The reason for the "pertaining to the defendant" phrase in Javor is that Javor involved a multi-defendant trial; the reason for the absence of such a phrase in Burdine is that Burdine was tried alone.

[9] The phrase quoted by Texas from Javor occurs in this sentence: "The magistrate . . . found as a matter of fact that Javor's attorney was sleeping while testimony pertaining to the petitioner was being adduced . . . " (724 F.2d at 834). The phrase

"conflict" with Tippins must reside in Tippins's description of the facts which it found sufficient to satisfy its defendant's-interests-at-stake formulation. Fortunately for the reader's understanding, the Tippins court devotes a whole section of its opinion to such a description (labeled exactly that way), and the central passage of the section says that "it is likely that [Tippins's lawyer] . . . slept during the testimony of five out of the . . . eight [prosecution] witnesses," whose testimony was such that "these witnesses should have commanded close attention from Tippins's counsel" (77 F.3d at 689). In other words – but unmistakably – Tippins's lawyer slept while prosecution evidence was being adduced.

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misquoted by Texas from Burdine occurs in this sentence: "Burdine has alleged and the state court findings support the fact that Burdine's counsel was unconscious, and hence absent, repeatedly throughout the guilt-innocence phase of Burdine's trial as evidence was being produced against Burdine" (262 F.3d at 348). The misquotation (which of course we assume was unintentional) consists of changing the past-tense verb to present tense, thereby making the court's recitation of fact sound like the enunciation of a legal rule.

(4) Javor, Tippins and Burdine do **not** "apply different presumptions of prejudice – either a *per se* presumption based on a 'critical stage' concept, App. 2a; Javor, 724 F.2d, at 833, or a limited presumption related to the 'actual conflict of interest' rationale, Tippins, 77 F.3d, at 686." (Pet at 12). To the contrary, Javor, Tippins and Burdine all apply the same Powell-Cronic presumption of prejudice[10] (somewhat misleadingly labeled a "*per se*" rule by Texas).[11] It is difficult to find

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[10] Javor: "Javor's sixth amendment right to counsel was violated not because of specific legal errors or omissions indicating incompetence, but because he had *no* legal assistance during a substantial portion of his trial. The magistrate's finding of no actual prejudice is not controlling because regardless of counsel's participation when present, when a defendant is tried in the partial absence of counsel, he is prejudiced as a matter of law." (724 F.2d at 834).

Tippins: "Although respondent argues that Tippins failed to carry his burden of adducing specific attorney errors resulting in prejudice, we understand Tippins's claim of prejudice to be not that his lawyer should have taken any particular initiative that would potentially affect the result, but that, at critical times, Tippins had no counsel to sort out what initiatives were open. Under these circumstances, where the adversary nature of the proceeding was subject to repeated suspensions, there is little difference between saying that prejudice will be presumed and saying that prejudice has been demonstrated." (77 F.3d at 687).

Burdine: "As recognized by the Second Circuit, 'the buried assumption in our Strickland cases is that counsel is present and conscious to exercise judgment, calculation and instinct, for better or worse. But that is an assumption we cannot make when counsel is unconscious at critical times.' Tippins . . . When we have no basis for assuming that counsel exercised judgment on behalf of his client during critical stages of trial, we have insufficient basis for trusting the fairness of that trial and consequently must presume prejudice." (262 F.3d at 349; App. 19a).

[11] While the Powell-Cronic presumption is sometimes described as a rule of *per se* prejudice (and Tippins uses this phrase), the phrase is ambiguous. It might describe either (A) the nature of the circumstances that *give rise to* the presumption or (B) the *effect* of

the remotest basis in the Tippins opinion for Texas's reading of Tippins as applying a "limited presumption related to the 'actual conflict of interest' rationale," since (a) Tippins's only discussion of the actual-conflict-of-interest rationale comes in the context of its description of the two kinds of presumptions recognized in Strickland v. Washington, 466 U.S. 668 (1984) – the Powell-Cronic presumption and "another, more limited, type of presumed prejudice" illustrated by "cases in which counsel is burdened by a conflict of interest" (77 F.3d at 686); and (b) Tippins states unambiguously that the kind of presumption it is applying is the former kind: the circumstances of Tippins's lawyer's sleeping "suggest 'a breakdown in the adversarial process that our system counts on to produce just results,' Strickland v. Washington, 466 U.S. 668, 696 . . . [(1984)], and from which we must presume prejudice to the defendant." (77 F.3d at 685). In any event, it is plain as a pikestaff that, just as the court below in Burdine emphasized that "we decline to adopt a per se rule that any dozing by defense counsel during trial merits a presumption of prejudice" (262 F.3d at 349; App. 20a), Tippins was enphasizing that "[w]e are

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the presumption in obviating the requirement of showing prejudice. The opinion below does not use the phrase (as Texas does) to describe the *effect* of the presumption but rather in describing the circumstances that give rise to it. That is why the *en banc* opinion in Burdine says explicitly that "we ***decline*** to adopt a per se rule that any dozing by defense counsel during trial merits a presumption of prejudice" (262 F.3d at 349; App. 20a [emphasis added]).

reluctant to extend a rule of *per se* prejudice in anynew direction" (77 F.3d at 686). Both courts applied the Powell - Cronic rule only because they found – as Javor had before them – that counsel's repeated episodes of unconsciousness under the circumstances of each case amounted *factually* to a situation in which the defendant had "no counsel at all." Javor, 724 F.2d at 834; Tippins, 77 F.3d at 686; Burdine, 262 F.3d at 349; App.19a; *see* note 5, *supra*.

No fair examination of Javor, Tippins and Burdine could find a hint of inter-circuit conflict in them They are all three case-specific, fact-grounded applications of the Powell-Cronic rule; but – both in talking about their facts and in explaining why the rule applies to those facts –they are entirely harmonious.

Purported Conflict II

Texas's second assertion of inter-circuit conflict (in Point II at pages 13 - 17 of the *cert.* petition) has to do with cases in which lawyers were out of the courtroom during some portion of their client's criminal trial. For the most part, these are situations in which, during a multi-defendant trial, the attorneyfor one defendant is excused for a period in order to meet some other professional obligation. Texas says that in these cases 'the state and federal courts"(Pet. at 13) "actually diverge on two distinct issues"(Pet. at 14): "whether the entire evidentiary portion of trial constitutes a 'critical stage' under Cronic" (Pet. at 14),

and "whether counsel's temporary absence from even critical evidentiary portions of trial is amenable to harmless error analysis." (Pet. at 13). It asserts that "Burdine squarely places the Fifth Circuit on one side of this conflict and strengthens the disagreement" relating to both "issues," because Burdine "treat[ed] every segment of the evidentiary phase of trial as critical" (Pet. at 15) and, having "equated sleeping with physical absence, . . . held that counsel's sleeping during any evidentiary portion of trial will always result in automatic reversal and a new trial." (Pet. at 15).

The short answer to these contentions is that Texas has once again demonstrably misrepresented both what Burdine holds and what the prior cases in the various circuits say and do. Burdine itself explicitly disavows the categorical rules that Texas says Burdine announces; and no circuit espouses those rules.

A more detailed answer is this:

(1) Burdine does **not** "treat[ ] every segment of the evidentiary phase of trial as critical." (Pet. at 15). In ascribing this holding to the decision below, Texas necessarily insists that the *en banc* "majority effectively overruled a prior panel decision, [United States v.] Russell, [205 F.3d 768 (5th Cir. 2000)], that had refused to hold that the evidentiary phases of a trial are always critical." (Pet. at 15). Texas's sole authority for the proposition that Burdine has overruled Russell is

Judge Barksdale's dissent. *Id.* By contrast, the *en banc* majority itself (a) explicitly relies on Russell as a precedent for its Burdine holding (262 F.3d at 345 - 347; App. 14a - 16a), (b) explicitly states that Russell "refused to adopt a per se rule that the taking of any evidence at trial in the absence of counsel warrants a presumption of prejudice" (262 F.3d at 346; App. 15a), and (c) ends by saying explicitly that "[a]s in Russell, we decline to adopt a per se rule that any dozing by defense counsel during trial merits a presumption of prejudice" (262 F.3d at 349; App. 20a).

Nor does Burdine "h[o]ld that counsel's sleeping during any evidentiary portion of trial will always result in automatic reversal and a new trial" (Pet. at 15). The court below could not be more explicit in saying: "Our holding, that the repeated unconsciousness of Burdine's counsel through not insubstantial portions of the critical guilt-innocence phase of Burdine's capital murder trial warrants a presumption of prejudice, is limited to the egregious facts found by the state habeas court in this case." (262 F.3d at 349; App. 20a).[12] Just as "[t]he State's arguments [in the Fifth Circuit] fail[ed] to address the fundamental unfairness in Burdine's capital murder trial created by the consistent unconsciousness of his counsel" (262

[12] Judge Higginbotham's concurring opinion was no less explicit: "What is . . . clear is that what constitutes a 'critical stage of the proceeding' and even 'absence of counsel' depends on an assessment of the facts of each case." (262 F.3d at 354; App. 26a.)

F.3d at 341; App. 6a), the State now persists in ignoring that such unfairness –not some categorical "automatic reversal" rule – was the stated ground of the Fifth Circuit's decision.[13]

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[13] "Unconscious counsel does not analyze, object, listen or in any way exercise judgment on behalf of a client. . . . When we have no basis for assuming that counsel exercised judgment on behalf of his client during critical stages of trial, we have insufficient basis for trusting the fairness of that trial and consequently must presume prejudice." (262 F.3d at 349; App. 20a). Texas apparently seeks *certiorari* to renew in this Court the self-insulating argument it made without success below, that because Burdine's attorney slept on and off repeatedly throughout his trial, it is impossible to pinpoint precisely what portions of the prosecution's case against his client he missed; *ergo*, no prejudice can be shown to have resulted from his unconsciousness. As Judge Higginbotham said with characteristic trenchancy in concurrence: "The search for the precise evidence that came in as Burdine's counsel slept rests upon a view of trial dynamics and reality that confounds my forty years in the courtroom. . . . [T]hat is not the way it works, and for the same reasons it is not the law. We presume prejudice because experience tells us that an occurrence presents both a high probability of prejudice and a difficulty of 'proving it' in any finite sense. The law speaks of presumption not to supply a missing ingredient, but rather to recognize its inevitable presence." (262 F.3d at 355;

App. 27a).

(2) It is **not** true that "[s]ome courts, like the Sixth Circuit and the South Carolina Supreme Court, . . . find reversible error from any temporary absence of counsel during the evidentiary portion of the trial . . . [whereas o]ther courts, like the Seventh Circuit, the Eleventh Circuit, and a New Jersey intermediate appellate court, disagree . . ." (Pet. at 14). Texas relies on Green v. Arn, 809 F.2d 1257 (6th Cir. 1987), *vacated on other grounds*, 484 U.S 806 (1987), *reinstated*, 839 F.2d 300 (6th Cir. 1987), and cases following Green to support its depiction of a two-headed automatic-reversal rule[14] applicable to "any temporary absence of counsel during the evidentiary portion of the trial" (Pet. at 14). However, with respect to the first head – Texas's projection of "Green's rule that the 'taking of evidence on the defendant's guilt' is always a critical stage" (Pet. at 14)[15] – the express basis for the Green decision is that, "[a]lthough it may be that some

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[14] "[T]he courts actually diverge on two distinct issues." (Pet. at 14).

[15] This projection is typical of the way in which Texas's *cert.* petition discusses cases. The internal quotation is said to come from Carter v. Sowders, 5 F.3d 975, 979 (6th Cir. 1993), which the *cert.* petition describes as "confirming Green's rule that the 'taking of evidence on the defendant's guilt' is always a critical stage" (Pet. at 14). However, the only occurrence of the quoted language in the Carter opinion is a *double* quotation, from Green quoting a Seventh Circuit case, Siverson v. O'Leary, 764 F.2d 1208 (7th Cir.1985). One would think that Texas might have revealed the origin of its quoted language to this Court, in light of its claim that the Seventh Circuit "disagree[s]" with the Sixth on this precise point.

absences by a criminal defendant's attorney might be so *de minimis* that there would be no constitutional significance, the instant record unequivocally demonstrates that . . . [Green's lawyer's] absence was not *de minimis*." (809 F.2d at 1261). And in reinstating its Green decision after a remand by this Court to consider an issue of mootness, the Sixth Circuit observed that '[t]he controlling issue on appeal was whether harmless error analysis was appropriate where a petitioner demonstrated she was unrepresented bycounsel *for a critical period of time* ***during*** the taking of evidence against her at trial." Green v. Arn, 839 F.2d 300, 301 (6th Cir. 1988) (emphasis added).[16] As for Texas's second head – the purported "*per se* rule adopted by the Sixth Circuit" – the Green opinion does not "contradict[ ] the approach of other courts that would . . . determine whether . . . [absences by counsel] occurred at critical junctures, and, even then, ask whether they were harmless beyond a reasonable doubt" (Pet. at 16). Green endorses precisely this approach.[17]

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[16] Texas says that McKnight v. State, 320 S.C. 356, 465 S.E.2d 352 (1995) is in accord with Green v. Arn in "find[ing] reversible error from any temporary absence of counsel during the evidentiary portion of the trial" (Petition, p. 14). It is true that McKnight follows Green but false that McKnight holds – or reads Green as holding – what Texas says the two cases hold. *See* note 19 *infra*.

[17] *See* 809 F.2d at 1263: "Where the Sixth Amendment claim is the denial, rather than the ineffective assistance, of counsel, the criminal defendant need only show that counsel was absent during a critical stage of the proceedings in order to establish the constitutional violation. Absence from the proceedings is deficient performance as a

matter of law, and prejudice is presumed. Nonetheless, a harmless error analysis is appropriate in some instances." *See also* Perry v. Howes, [852 F.2d 568] 1988 WL 74153 *4 (6th Cir. 1988 [unpublished]):

> In Green, we held that counsel's absence during the cross-examination of a prosecution witness was prejudicial per se and that therefore harmless error analysis was inapplicable. We also noted that 'some absences by a criminal defendant's attorney might be so de minimis that there would be no constitutional significance.' 809 F.2d at 1261. Suggested circumstances to which harmless error analysis would be appropriate were preliminary hearings, jury deliberations, and return of the verdict.
>
> In the case at bar it does not seem to us that the rereading of transcribed testimony to the jury after the submission of the case for deliberation represented a critical stage in petitioner's trial. Although she and a representative of her attorney were both present in the courtroom while the prosecutor reread Knight's testimony, petitioner has not suggested that anyone in the courtroom did anything improper. She has not demonstrated any prejudice whatever, and the harmless error rule therefore controls this branch of petitioner's case.

The Seventh and Eleventh Circuit cases that Texas attempts to portray as conflicting with Green do not. The Seventh Circuit case, United States v. Morrison, 946 F.2d 484 (7th Cir. 1991), involved a multi-defendant trial that continued while one defendant's lawyer was out of the courtroom. The lawyer missed the direct examination of two prosecution witnesses and the cross-examination of another by counsel for the co-defendants. The Court of Appeals found that the testimony given in the two direct examinations "had no bearing at all on the government's case against [the absent lawyer's client]." (946 F.2d at 502). As for the cross-examinations, the lawyer

> was present for . . . [the witness's] direct examination and to cross-examine . . . [the witness] himself. On the facts before us, we do not perceive the potential for 'substantial' prejudice in . . . [the lawyer's] absence [while counsel for co-defendants cross-examined]. Our conclusion might be different if . . . [the lawyer's client] and his co-defendants were presenting antagonistic defenses; if this were the case, . . . [the lawyer's] presence during co-counsel's cross- examination would indeed be important.

(946 F.2d at 503).[18] Similarly, in Vines v. United States, 298 F.3d 1123 (11th Cir.

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[18] The court went on to make a similar harmless-error finding with respect to counsel's absence during "the court's *reading* of the jury instructions (as opposed, perhaps to a court's jury instruction conference with counsel)" (946 F.2d at 503; original emphasis) and when the jury returned its verdict. In connection with the latter finding, the Morrison court cited the harmless-error analysis in Siverson v. O'Leary, 764 F.2d 1208 (7th Cir. 1985), a case which was also cited with approval by the Sixth Circuit in *Green* (*see* note 15 *supra* and note 19 *infra*).

1994), the Eleventh Circuit found that the absence of one defendant's lawyer during the testimony of two prosecution witnesses in a multi-defendant trial was harmless error. It noted that in Green "the Sixth Circuit held that '[t]he absence of counsel during the taking of evidence *on the defendant's guilt* is prejudical [sic]per se and justifies an automatic grant of the writ 'without any opportunity for a harmless error inquiry'" (298 F.3d at 1128 n. 9 [emphasis added by the Eleventh Circuit]) but said that "the Green court also recognized that 'some absences by a criminal defendant's attorney might be so de minimis that there would be no constitutional significance.'" *Id.* The Eleventh Circuit found that this was the case in Vines because the testimony given by the two witnesses while Vines's lawyer was out of the courtroom did not directly inculpate Vines but rather was directed solelyat another defendant. (298 F.3d at 1128, 1130). The court reserved the question whether the same result would follow if the juryhad convicted Vines of conspiring with that co-defendant (298 F.3d at 1129 n. 12); conversely, it found that the jury's verdict acquitting Vines of just such a conspiracycharge "suggests that the jurydid not link . . . [the two witnesses'] testimony to Vines" (298 F.3d at 1131).

What is plainly going on in Texas's "temporary absence" category of cases (Pet. at 13) is not inconsistent rule formulation but consistent factual analysis of the

various, differing case-specific circumstances under which – particularly in protracted, multi-defendant trials – a defendant's lawyer is called out of the courtroom for a time while the proceedings continue.[19] Where the lawyer's absence is significant, the courts are having no trouble following the rule of Cronic that applies "when counsel was . . . totally absent . . . during a critical stage of the proceeding";[20] where the absence is insignificant, they are having no trouble finding

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[19] It is noteworthy that, while Texas claims that the Seventh and Eleventh Circuits "disagree" with the Sixth Circuit's analysis in Green v. Arn (Pet. at 14), the Green court itself relied on Seventh and Eleventh Circuit cases – Siverson v. O'Leary, 764 F.2d 1208 (7th Cir. 1985), and Golden v. Newsome, 755 F.2d 1478 (11th Cir. 1985) – which continue to be cited with approval in all three circuits. *See, e.g.*, notes 15 and 18 *supra*. Similarly, the Seventh Circuit in United States v. Patterson, 215 F.3d 776, 784, 785 (2000), relies on the Fifth Circuit's Russell decision, which, as we have seen, is the progenitor of the Burdine decision below. It is also noteworthy that the South Carolina case (McKnight, footnote 16 *supra*) which Texas cites as following Green in "find[ing] reversible error from any temporary absence of counsel during the evidentiary portion of the trial" (Pet. at 14) in fact disclaims such a rule and cites Green, Morrison and Vines (Texas's supposedly conflicting circuit cases) together in rejecting the rule:

> We do not mean to suggest . . . that an automatic reversal is required every time counsel is absent from any part of a trial. Some absences might be so de minimis they would have no constitutional significance. Green, 809 F.2d at 1261. *See also* Vines v. United States, 28 F.3d 1123, 1128 (11th Cir.1994) (stating 'where ... no evidence directly inculpating a defendant is presented while that defendant's counsel is absent, we decline to hold that counsel was absent during a critical stage of trial'); United States v. Morrison, 946 F.2d 484 (7th Cir.1991), *cert. denied sub nom.* Anderson v. United States, 506 U.S. 1039, 113 S.Ct. 826, 121 L.Ed.2d 696 (1992).

(320 S.C. at 359 n.2, 465 S.E.2d at 354 n. 2.)

[20] Cronic, 466 U.S. at 659 n. 25. *See also* Strickland, 466 U.S. at 692: "Actual or constructive denial of the assistance of counsel altogether is legally presumed to result

that the Cronic rule does not apply. No sub-rule does, or can, serve to sort significant absences from insignificant absences; that is inescapably a matter of record-based judgments which have to be made on the specific facts of each case by judges with the training and experience to discern what is important or unimportant in trial proceedings. Nothing in the circuit cases on the subject suggests the slightest need for this Court's *certiorari* review. And, if such review were needed at all, the appropriate vehicle for it would obviously be one of the prototypical multi-defendant/counsel-called-away cases, not a wildly aberrant, merely tangentially relevant case like Burdine.[21]

Purported Conflict III

The short answer to Texas's third purported conflict (*see* Point III, Pet. at 17-21) is that its deliberately alarmist predictions disregard logic, history and Point I

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in prejudice."

[21] The last point applies in spades to Texas's heavy reliance on State v. Scherzer, 301 N.J. Super. 363, 694 A.2d 196 (1997), *cert. denied*, 700 A.2d 878 (N.J. 1997). There is no doubt that the Scherzer opinion mis-describes Green v. Arn in the same way that Texas does. But if a New Jersey intermediate appellate court's misconstruction of a Sixth Circuit decision could ever warrant this Court's concern as the basis for a grant of *certiorari* (particularly when (a) the New Jersey intermediate appellate court does not *follow* its misconstruction of the Sixth Circuit, and (b) no other federal or state courts are misconstruing the Sixth Circuit decision, and (c) the New Jersey Supreme Court appears to understand the uniform federal circuit case law on the subject correctly, *see* State v. Savage, 120 N.J. 594, 616 , 577 A.2d 455, 466 (1990)), the *cert.* grant would surely not be made in a Fifth Circuit case raising an only remotely related issue.

of the petition itself. Texas says in Point III that the Fifth Circuit decision below, by "elevating" Burdine's lawyer's unconsciousness to "presumed-prejudice status"

> will invite countless ineffective-assistance claims based on any type of intermittent 'unconsciousness' by counsel during trial. . . . In Burdine's wake, imaginative habeas petitioners will parade expert witnesses into their writ hearings to testify that – given trial counsel's subsequently-diagnosed Alzheimer's, or bipolar condition, or alcoholism, or attention-deficit disorder – it is likely that periods of unconsciousness occurred during trial, and therefore prejudice should be presumed.

(Pet. at 20).

Two false notes in this alarm are immediately apparent. First, Texas also argues *within* Point III that the "Fifth Circuit [in Burdine] draws an arbitrary distinction between an attorney who intermittently sleeps during trial and an attorney impaired during trial by intoxicants, addiction, or illness." (Pet. at 19). But if, as this argument repeatedly asserts, the Fifth Circuit "*distinguished* 'the drunk or drugged attorney' from the sleeping lawyer" (Pet. at 17-18) (emphasis added), "carv[ed] 'intermittent attorney sleeping' from the class of all possible attorney-impairments" (Pet. at 20), and "set aside [this] one kind of attorney-impairment for a presumption of prejudice" (Pet. at 17), then it is difficult to see how a habeas petitioner who is capable of reading and who cares about the contents of judicial opinions at all could possibly think that Burdine ***supports*** a claim of presumed prejudice based upon a lawyer's alcoholism, mental illness, or other

chronic debilitating conditions.

Second, Texas says (in footnote 3 on page 19) that the identical complaints which its Point III lodges against the Fifth Circuit's decision in Burdine apply equally to Javor. Javor was decided in 1984 and followed by Tippins in 1996. The various differences which Texas claimed to discern among Javor, Tippins and Burdine in Point I of its petition would – if they existed – make Javor and Tippins **more** favorable precedents than Burdine for "imaginative habeas petitioners" wishing to "parade" debilitated-lawyer claims in federal court.[22] Yet Texas's Point III concedes – indeed, insists – that the circuits have uniformly treated debilitated-counsel claims altogether differently than Javor and Tippins treated the claim they

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[22] As Texas describes the four areas of supposed discrepancy among Javor, Tippins and Burdine at pages 12-13 of the petition, Javor would be more inviting to "imaginative habeas petitioners" than Tippins and Burdine in one area; Tippins would be more inviting to "imaginative habeas petitioners" than Javor and Burdine in one area; two areas would probably be a wash; and in *no* area would Burdine be more favorable to "imaginative habeas petitioners" than both Javor and Tippins. We have shown above that all of Texas's supposed discrepancies are chimerical to start with. But it is nonetheless surprising that Texas, having argued fervently for the existence and importance of these distinctions in its Point I, overlooks them completely in crafting its Point III.

have in common with Burdine. So, on Texas's own reasoning: (A) Burdine creates no incentive that did not previously exist to raise any of Texas's roster of debilitated-lawyer claims; and (B) there is already a well-settled body of case law dealing with those claims which Burdine cannot plausibly be expected to unsettle.

If Texas is correct that Burdine is in conflict with such decisions as Johnson v. Norris, 207 F.3d 515 (8th Cir. 2000) [described at page 18 of its petition as a "representative conflicting decision"], then those decisions must also conflict with Javor and Tippins.[23] Yet both the Ninth Circuit and the Second Circuit [and district courts in the two circuits] have repeatedly approached debilitated-lawyer cases in exactly the same way that Norris does, perceiving no dissonance whatever between that approach and the circuits' respective decisions in Javor and Tippins *See, e.g.*, Bellamy v. Cogdell, 974 F.2d 302 (2nd Cir. 1992) (*en banc*); United States v. Scaretta, [111 F.3d 124] 1997 WL 165379, *6-*7 (2nd Cir. 1997) [unpublished] Aiello v. United States, [159 F.3d 1345] 1998 WL 398800, *2 (2nd Cir. 1998) [unpublished] (citing Tippins as in "accord" with Bellamy); Smith v. Ylst, 826 F.2d 872 (9th Cir. 1987); Feliciana v. United States, [990 F.2d 1257] 1993 WL 74343, *2 (9th Cir. 1993) [unpublished]; Coates v. McCormick, [5 F.3d 535] 1993 WL

[23] Texas does not dispute this. Indeed, it affirmatively asserts that "this entire line of [debilitated-counsel] cases contradicts Javor itself." (Pet. at 19 n. 3).

321608, *1 (9th Cir. 1993) [unpublished] Biggs v. Borg, [205 F.3d 1350] 1999 WL 1217825, *2 (9th Cir. 1999) [unpublished] and *see, e.g.*, Friedgood v. Keane, 51 F. Supp. 2d 327 (E.D.N.Y. 1999) ; Bonin v. Vasquez, 794 F. Supp. 957, 966 - 967 (C.D. Cal. 1992), *aff'd sub nom.* Bonin v. Calderon, 59 F.3d 815 (9th Cir. 1995), *subsequent history in* 77 F.3d 1155 (9th Cir. 1996).

A more detailed look at Point III of Texas's petition and at the body of case law discussed incompletely in that Point reveals how Texas has once again put a conflict-creating spin on cases that will not fairly support it. The spin here is achieved by punning on the word "impairment," using it to describe both:

(1) an acute state of total insensibility that renders a lawyer incapable of action, cognition or even perception of what is going on in the courtroom for extended periods while evidence is coming in against his client; and,

(2) a chronic, general mental or physical condition (like alcoholism or schizophrenia) that renders a lawyer susceptible to potential episodes of varying degrees of disability for varying periods of time under varying conditions, and which may or may not affect him or her in the courtroom.

Texas refers to the latter conditions as "Other Attorney Impairments" (Pet. at 17,

caption III) and argues that the Fifth Circuit decision below drew an "arbitrary distinction" (Pet. at 19) between them and a lawyer who "was repeatedly asleep, and hence unconscious, as witnesses adverse to Burdine were examined and other evidence against Burdine was introduced."(262 F.3d at 349; App. 19a). Thus, Texas says, "reserving a presumption of prejudice for sleeping alone presents a conflict [among the circuits that] the Court should resolve." (Pet. at 18).

But what the case law plainly demonstrates is **not** two conflicting rules or approaches "in tension" (Pet. at 18). Rather, all of the circuits follow the same rule and take the same approach, which – for reasons that they all describe identically and Texas does not talk about – treat *factually* different situations (1) and (2) in sensibly different ways:[24]

(1) The situation addressed in Burdine – and in Javor and Tippins before it – has to do with a lawyer who is repeatedly unconscious, and is therefore

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[24] Put another way, the cases do not drawn any *legal* or *doctrinal* "distinction" (Pet. at 19) between acute unconsciousness on the one hand and chronic conditions like alcoholism or mental disorder on the other; and the *factual* distinction which they recognize between these two things is not "arbitrary" (Pet. at 19) but is as obvious as the difference between being **liable** to epileptic seizures and being **in the throes of** a *grand mal* seizure.

totally unable to function, while the evidentiary case against his client is being presented to the jury. The courts recognize that this is a time when the "subject[ion of] the prosecution's case to meaningful adversarial testing" (Cronic, 466 U.S. at 659) depends fundamentally upon "'the participation of trial counsel (to observe witnesses, listen to testimony, consider the posing of objections, prepare cross-examination of witnesses, consider the preparation of rebuttal evidence, and prepare argument on such evidence).'" (Javor, 724 F.2d at 832 [quoting from the findings of the federal magistrate].) They also recognize that an unconscious lawyer is as able to do any of these things, and is therefore of as much use to his client or the adversary process, as a stuffed owl in a taxidermist's window.

(2) By contrast, the cases dealing with what Texas calls "other attorney-impairments" (Pet. at 19) have to do with general conditions of illness – alcoholism, drug addiction, mental disorder, Alzheimer's disease – which afflict individuals over a prolonged period but fluctuate in their immediate effects on a person's mental and physical capabilities. Under certain circumstances, any of these conditions *may result* in an episode of unconsciousness, but the fact that a person is (for example) an alcoholic or even a schizophrenic does not mean that s/he was unconscious at any particular time and place during the period when the

condition existed. Nor does the fact that s/he is an alcoholic or a schizophrenic *alone* provide a basis for concluding that, at anyparticular time and place, s/he was undergoing some degree of impairment less than unconsciousness, or –if s/he was – what the nature and extent of the impairment was. It is these obvious facts of life that have led the circuit courts to hold, without exception,[25] that such general

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[25] *See, e.g.*, Smith v. Ylst, 826 F.2d 872, 875-876 (9th Cir. 1987):

> The district court rejected the invitation to adopt a per se rule that counsel's alleged mental illness is inherently prejudicial. The court reasoned that the mere existence of a loosely described mental illness or condition cannot be assumed to affect legal proceedings unless the condition manifests itself in courtroom behavior. . . .
> The court reasoned that mental illness is too varied in its symptoms and effects to justify a per se reversal rule without evidence that the attorney's performance fell below the constitutional norm. The court was convinced it would need to see a correlation between the alleged mental condition and specific aspects of the attorney's performance of his duties, and thus it applied the Strickland test and evaluated the record of the trial to determine whether there were prejudicial errors.
> We agree with the district court's analysis.

and Bellamy v. Cogdell, 974 F.2d 302, 308 (2nd Cir. 1992) (*en banc*):

> [T]here is simply nothing inherent in an attorney's illness that necessarily will impede a spirited defense 'most of the time' to justify finding the attorney's representation *per se* ineffective. Rather, given the varying effects health problems can have on an individual's ability to function, claims of ineffective assistance based on attorney illness are best suited to the fact-specific prejudice inquiry mandated by Strickland.

and Johnson v. Norris, 207 F.3d 515, 518 (8th Cir. 2000), quoted by Texas, Pet. at 18:

> Bipolar disorder, like most mental illnesses, can have varying effects on an individual's ability to function, and the disease can vary widely in the degree

conditions on the part of a criminal defense lawyer, encompassing the period when s/he tried a particular case, do not give rise to a presumption of ineffective

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> of its severity. We are not convinced there is anything about Mr. Smith's bipolar condition that would not lend itself to the normal fact-specific Strickland analysis.

and the Burdine decision below, 262 F.3d at 349; App. 19a - 20a:

> The State maintains that it is impossible to distinguish between sleeping counsel and other impairments that nevertheless have been subjected to prejudice analysis. We disagree. An unconscious attorney does not, indeed cannot, perform at all. This fact distinguishes the sleeping lawyer from the drunk or drugged one. Even the intoxicated attorney exercises judgment, though perhaps impaired, on behalf of his client at all times during a trial. Yet, the attorney that is unconscious during critical stages of a trial is simply not capable of exercising judgment.

and Tippins, 77 F.3d at 686:

> We are reluctant to extend a rule of *per se* prejudice in any new direction. Ordinarily, episodes of inattention or slumber are perfectly amenable to analysis under the Strickland prejudice test. . . . Prolonged inattention during stretches of a long trial (by sleep, preoccupation or otherwise), particularly during periods concerned with other defendants, uncontested issues, or matters peripheral to a particular defendant, may be quantitatively substantial but without consequence. At such times, even alert and resourceful counsel cannot affect the proceedings to a client's advantage.
>
> However, as the majority reasoned in Javor, '[p]rejudice is inherent' at some point, 'because unconscious or sleeping counsel is equivalent to no counsel at all.' 724 F.2d at 834. Effectiveness of counsel depends in part on the ability to confer with the client during trial on a continuous basis, and the attorney must be 'present and attentive' in order to make adequate cross-examination . . . . Moreover, if counsel sleeps, the ordinary analytical tools for identifying prejudice are unavailable. The errors and lost opportunities may not be visible in the record, and the reviewing court applying the traditional Strickland analysis may be forced to engage in 'unguided speculation.'"

assistance, prejudice, or anything else.[26]

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[26] *See, e.g.*, Caballero v. Keane, 42 F.3d 738, 740 (2nd Cir. 1994) (drug and alcohol use "alone, [do] not establish ineffectiveness"); Frye v. Lee, 235 F.3d 897, 907 (4th Cir. 2000) (same); Berry v. King, 765 F.2d 451, 454 (5th Cir. 1985) ("the fact that an attorney used drugs is not, *in and of itself*, relevant to an ineffective assistance claim" [court's emphasis]); Burnett v. Collins, 982 F.2d 922, 930 (5th Cir. 1993) (same; and "Burnett points to no specific instances where counsel's performance *during trial* was deficient because of alcohol abuse, nor are any such apparent from the record of trial or the hearing on the amended motion for new trial" [court's emphasis]); Fowler v. Parratt, 682 F.2d 746, 750 (8th Cir. 1982) (declining to create a rebuttable presumption of prejudice once an attorney has been shown to have been alcoholic generally); Bonin v. Calderon, 59 F.3d 815, 838 (9th Cir. 1995) (same); Young v. Zant, 727 F.2d 1489, 1492 - 1493 (11th Cir. 1984) (same).

Confronted with a claim that a criminal defendant's lawyer was rendered ineffective by such a condition, the courts uniformly examine the record to determine whether the condition adversely affected the lawyer's performance in the specific proceedings in which s/he represented the defendant, and what that effect was. It usually turns out, as a matter of *fact*, that no adverse effects are found;[27] but, when they are found, the outcome depends on the specific nature of the effects. If those effects were discrete failings of performance that can be evaluated on the record, they are so evaluated under the ordinary standards of Strickland v. Washington.[28] In the rare case in which they are so pervasive as to render the lawyer completely dysfunctional, resulting in an "actual breakdown of the adversarial process" within the contemplation of United States v. Cronic (466 U.S. at 657), Sixth Amendment relief is granted in accordance with Cronic's recognition that such "a breakdown in the adversarial process . . . would justify a presumption

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[27] *See, e.g.*, Williams v. Taylor, 163 F.3d 860, 871 - 872 (4th Cir. 1998), *rev'd on other grounds*, 529 U.S. 362 (2000); Hochstein v. Hopkins, 113 F.3d 143, 147 (8th Cir. 1997); the Smith and Bellamy cases cited in note 25 *supra*; and the Berry and Young cases cited in note 26 *supra*.

[28] *Compare* Johnson v. Norris, cited in note 25 *supra* (denying relief where counsel's failings were neither prejudicial nor so serious as to amount to substandard performance) *with* Pilchak v. Camper, 935 F.2d 145, 148 (8th Cir. 1991) (contributing ground), *ruling on another issue questioned in* Waring v. Delo, 7 F.3d 753, 757 - 758 (8th Cir. 1993) (granting relief where, as a consequence of Alzheimer's disease, counsel made a seriously prejudicial misjudgment).

that respondent's conviction was insufficientlyreliable to satisfy the Constitution (466 U.S. at 662).[29] Such rare cases are treated consistentlywith the rare cases of repeated, complete, extended unconsciousness of a lawyer while the prosecution musters its evidence against that lawyer's client – Javor, Tippins and Burdine alone, over a period of more than a generation – because the bottom-line facts have turned out to be the same: "When we have no basis for assuming that counsel exercised judgment on behalf of his client during critical stages of trial, we have insufficient basis for trusting the fairness of that trial and consequentlymust presume prejudice." (Burdine, 262 F.3d at 349; App. 19a).

CONCLUSION

Texas's claims of inter-circuit conflict are baseless. The decision below is a case-specific, fact-based ruling on a point of such exceeding raritythat the federal courts have seen its like exactlythree times since the mid-1980's. *Certiorari* should be denied.

Respectfully submitted,

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[29] Morse v. Trippett, 102 F. Supp.2d 392 (E.D. Mich. 2000). *See also* the North Dakota case cited in footnote 3 of Texas's petition at p.19, State v. Keller, 223 N.W. 698 (1929).

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 2001

No.01- 495

JANIE COCKRELL,
Director, Texas Department of Criminal Justice,
Institutional Division,
Petitioner,

versus,

CALVIN JEROLD BURDINE,
Respondent.

On Petition for Writ of Certiorari
To the United State Court of Appeals for the Fifth Circuit

CERTIFICATE OF SERVICE

I hereby certify that I served a copy of the foregoing Brief in Opposition to Petition for Writ of Certiorari upon counsel for petitioner by faxing a copy of same to (512) 474-2697, and by depositing a copy of same in the U.S. mail, with proper postage affixed thereto, addressed to:

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This 27th day of November, 2001.

Robert L. McGlasson